IN THE

Supreme Court of the United States

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,
Petitioners

v.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, the Brotherhood of Railroad Trainmen, Local Lodges, Nos. 31, 32, 349, 401 and 446 of the Brotherhood, and Messrs. B. E. Roark, H. G. Thayne, W. C. Chandler, Carl F. Ahrens, N. E. Doolittle, M. C. Feather, and R. E. Carroll, officers of local units of the Brotherhood, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on April 13, 1961.

OPINIONS BELOW

The opinion of the District Court, printed in Appendix B hereto, *infra*, p. 6a, is reported in 185 F.

Supp. 369. The opinion of the Court of Appeals, printed in Appendix C hereto, *infra*, p. 15a, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1961. (Appendix C, *infra*, p. 22a). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

In the opinion of the petitioners, the following questions are presented by this petition:

1. Whether the Railway Labor Act deprives railroad employees of their common law right to strike against their employer railroad to obtain compliance with their contracts and redress for violations of such contracts by the railroad in a situation where the employees have submitted the dispute concerning interpretation of the contracts to the National Railroad Adjustment Board and that Board has rendered a decision in favor of the employees which the railroad refuses to honor?

2. Whether Section 4 of the Norris-LaGuardia Act prohibits a Federal Court from enjoining a strike of railroad employees against their employing railroad in the circumstances stated in paragraph 1 above?

3. Whether Section 8 of the Norris-LaGuardia Act prohibits a Federal Court from enjoining a strike of railroad employees against their employing railroad in the circumstances stated in paragraph 1 above?

4. Whether Section 8 of the Norris-LaGuardia Act prohibits a Federal Court from enjoining a strike of

railroad employees against their employing railroad in the circumstances stated in paragraph 1 above and in the further circumstance that such railroad has also failed to make every reasonable effort to settle such dispute by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration?

STATUTES INVOLVED

The statutory provisions involved are Section 3 of the Railway Labor Act (45 U.S.C. Section 153) and Sections 4, 8 and 13 of the Norris-LaGuardia Act (29 U.S.C. Section 104, 108 and 113). They are printed in Appendix A, *infra*, p. 1a.[1]

STATEMENT

This case involves the interpretation and application of the Railway Labor Act (45 U.S.C. Sections 151 et seq.) and the Norris-LaGuardia Act (29 U.S.C. Sections 100 et seq.) to a threatened strike called by the Brotherhood in a situation where the National Railroad Adjustment Board found the respondent railroad to be in violation of its collective bargaining agreements covering employees represented by the Brotherhood, had entered orders sustaining the claims

[1] The complaint (R. 10) also cites the Interstate Commerce Act. Neither the District Court nor the Court of Appeals makes any mention of this statute and in the opinion of petitioners the provisions thereof have no bearing on the present case. The complaint (R. 9) also cites Sections 1a and 2 of the Railway Labor Act (45 U.S.C. Sections 151a and 152). The District Court does not cite any of these statutory provisions. The Court of Appeals does cite Section 1a which sets forth the general purposes of the Railway Labor Act. In the opinion of petitioners, these statutory provisions, which simply indicate the general purposes of the statute that employees and carriers should settle their disputes, are not controlling on the issues here involved.

of individual employees for one day's pay for certain specified dates on which such violations had occurred, and the respondent railroad had refused to honor the Adjustment Board decisions. The District Court held (1) that the threatened strike in such circumstances violated the provisions of the Railway Labor Act, because petitioners were required by that statute to seek redress for the contract violations only by judicial action in the Federal courts, and (2) that the District Court was not prohibited by the Norris-LaGuardia Act from enjoining the resort to self-help. (R. 30, 31). The Court of Appeals affirmed this decision. (Appendix C, *infra*, p. 22a).

The disputes which gave rise to this case arose under two separate collective bargaining agreements governing the terms and conditions of employment of employees of the respondent railroad represented by the Brotherhood.

The first dispute concerned provisions of the agreement dated February 1, 1952, between the Brotherhood and the respondent railroad and involved the right of the railroad under said agreement to inaugurate new runs or cancel old ones without notice to and negotiation with its employees covered by the agreement. (R. 6, 13). On March 6, 1952, the respondent railroad notified the Brotherhood of the carrier's intention to cancel its Provo-Eureka run, which was written into the agreement between the parties, and to install a new assignment. The Brotherhood protested but the carrier nevertheless carried out the cancellation of the old run and installation of the new run. (R. 13).

The second dispute between the Brotherhood and the respondent railroad concerned the question of whether

or not the railroad had the right under an agreement dated June 1, 1950, between the carrier and the Order of Railway Conductors and Brakemen, which governed rates of pay, rules, and working conditions, of brakemen represented by the Brotherhood, to require head brakemen to herd engines from in-bound trains to its tie-up track in the carrier's north yard at Denver. (R. 6, 15). The dispute arose out of the claims of certain conductors that the railroad violated the provisions of the collective bargaining agreement in question by requiring them to herd engines on various dates in August 1952. (R. 15).

Neither of the two disputes were settled by conferences between the Brotherhood and the railroad so that the Brotherhood on or about February 5, 1953, submitted the disputes to the First Division of the National Railroad Adjustment Board (R. 6) pursuant to the provisions of Section 3, First, (i) of the Railway Labor Act (45 U.S.C. Section 153, First, (i))[2]. Thereafter, the First Division of the Adjustment Board heard the disputes and on December 17, 1959, and January 20, 1960, handed down its decisions sustaining the claims of the Brotherhood. These decisions were in the form of awards and orders (R. 12-19) as provided by Sections 3, First, (m) (n) and (o) of the Railway Labor Act.

The award in the dispute concerning the right of the railroad to cancel the Provo-Eureka run without notice to and negotitaion with the Brotherhood (No. 19372) was based on the ground that in a series of some twelve awards the Division had ruled that the respond-

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[2] This Section is set forth in full in Appendix A hereto, *infra*, p. 1a.

ent railroad had yielded the right in its collective bargaining agreement to inaugurate new runs or cancel old ones without notice to and negotiation with the employees and that in negotiating for a change in such provisions of the agreement the carrier had attempted to and had not succeeded in obtaining an amendment permitting it to discontinue or rearrange old assignments. (R. 13, 14) The Division accompanied its award with an order to the carrier that the award was to be effective on or before January 17, 1960. (R. 15).

In the Adjustment Board proceedings resulting in Award No. 19389 (R. 15), the railroad relied upon the action of a Special Adjustment Board on the property denying a similar claim in 1952. The Adjustment Board rejected this argument with the following finding: (R. 15-17)

> "Virtually identical issues involving these parties, arising at the same point on carrier's system, have been passed upon numerous times heretofore by the parties themselves in voluntary settlements of claims between them, by this Division, by an Emergency Board, and by a Special Board on the property.
>
> * * * * *
>
> "However, Special Adjustment Board No. 12 on the property, denied a claim on June 23, 1952, and carrier naturally relies heavily upon this, pointing out the serious consideration that a different ruling in the instant case might penalize it even though it was in compliance with an award of an authorized tribunal, and was operating in accordance with such award. Nevertheless, it was inescapable that prior to the Special Board's decision there was unusual unanimity of precedent with respect to these same parties on the same issue at virtually the same point on the road."

he Board also pointed out (R. 17) that the 1952 pecial Board did not have before it this history and ckground of the contract issue involved. The Divi- on also accompanied this award with an order direct- g the carrier to comply therewith on or before Febru- y 20, 1961. (R. 18-19).

Both Board awards were decisions of a Neutral eferee since the carrier members of the Board dis- nted.

After the Adjustment Board handed down Award o. 19372, a representative of the Brotherhood met ith representatives of the railroad on four different casions in January 1960, concerning the carrier's mpliance with the awards and orders of the Adjust- ent Board. At that time the representative of the ilroad stated that payment of the award would be ade or report thereon worked up through the Salt ake City office of the railroad. Nothing was said at ese meetings concerning any carrier refusal to honor e award. (R. 41, 42). Thereafter, the representa- ve of the Brotherhood met with representatives of e railroad, at their request, in the railroad offices on ebruary 12, 1960, to discuss both Award No. 19372 d Award No. 19389 which had been handed down hile discussions were taking place concerning the rlier award. The railroad representatives informed e representative of the Brotherhood that they had en instructed to notify the Brotherhood that the rrier was not going to accept the awards until the otherhood secured an order from the United States istrict Court. (R. 42).

A subsequent meeting was held on March 3, 1960, tween representatives of the Brotherhood and repre-

sentatives of the railroad at which the carrier again reiterated that it would not honor the awards until it received an order from a court. (R. 42, 43). At neither of these meetings, nor at any other time, did the railroad attempt to negotiate a settlement of the awards nor did it propose a compromise of any sort with respect thereto. (R. 43). It has since ceased the practice involved in Award No. 19389 of using head brakemen to herd engines in its north yard at Denver, which was found by the First Division of the National Railroad Adjustment Board to be in violation of the collective bargaining agreement, but it has not paid the head brakemen involved the one day's pay to which they were held entitled by the Board for being required to herd engines in violation of the agreement. (R. 7, 43). The carrier has not restored the Provo-Eureka run which the First Division of the Adjustment Board held it had cancelled in violation of the collective bargaining agreement in Award No. 19372 (R. 44) nor has it paid to the brakemen involved the day's pay to which the First Division held them entitled for the violation of the agreement. (R. 7).

As a result of the carrier's refusal to honor the awards, the Brotherhood served a notice upon the railroad that the employees of the carrier represented by it would withdraw their services on April 15, 1960. (R. 8). Whereupon, the National Mediation Board proffered its emergency services, which were accepted by the Brotherhood, and the threatened strike was postponed pending mediation. (R. 8). On May 13, 1960, the National Mediation Board notified representatives of the Brotherhood and the railroad that further mediation efforts were not warranted and that the Board was closing its file on

the case. Upon receipt of this notice, the Brotherhood notified the carrier that the employees represented by the Brotherhood would withdraw their services on May 16, 1960. (R. 44).

On May 16, 1960, the respondent railroad filed its complaint in the District Court asking for a temporary restraining order, a preliminary injunction, and a permanent injunction against the threatened strike. (R. 3-12). There was attached to this complaint copies of the awards and orders of the First Division of the National Railroad Adjustment Board involved. (R. 12-19).

Paragraph 11 of the complaint alleged that the threatened strike was in violation of the provisions of Section 3, First, (p) of the the Railway Labor Act which was alleged to require the Brotherhood to file a suit in an appropriate United States District Court to obtain judicial relief from the carrier's refusal to honor the awards and orders of the First Division of the National Railroad Adjustment Board and thus prohibited the Brotherhood from conducting a strike following such refusal. (R. 7-9). Paragraph 12 of the complaint set forth the provisions of Section 1a of the Railway Labor Act (45 U.S.C. Section 151a), which contain the general purposes of the statute. These include avoidance of interruptions to interstate commerce or the operations of carriers engaged therein and the prompt and orderly settlement of disputes growing out of the interpretation or application of collective bargaining agreements. This paragraph of the complaint also sets forth the provisions of Section 2, First, of the statute (45 U.S.C. Section 152, First) which make it the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make

and maintain collective bargaining agreements and to settle all disputes arising out of the application of such agreements. Such paragraph did not allege in terms that the threatened strike violated the cited provisions of the statute, although it did state that the railroad was threatened by an unlawful strike notwithstanding these policy provisions. (R. 9).

The District Court issued an *ex parte* restraining order on May 16, 1960, and the threatened strike was halted a short time after the hour for it to begin. Thereafter, on May 26, 1960, a preliminary injunction was issued which continued in effect until a hearing on the railroad's petition for permanent injunctive relief. (R. 29).

On June 22, 1960, the petitioners filed their Answer to the Complaint. (R. 19-24). This answer admitted the material facts alleged in the complaint of which the petitioners had knowledge, with a few minor exceptions, but denied that the threatened strike involved any violation of the Railway Labor Act. In addition, the petitioners, in paragraph 24 of the answer, pleaded that the provisions of the Norris-LaGuardia Act (29 U.S.C. 101 et Seq.) took away any jurisdiction which the District Court might otherwise have to enjoin the threatened strike. (R. 24).

Following a trial which involved no dispute as to material fact but only as to the law (R. 34-44) the District Court on July 27, 1960, entered its Memorandum Opinion holding that the threatened strike violated the Railway Labor Act and that the Court was not prohibited by the Norris-LaGuardia Act from granting injunctive relief. (Appendix B, *infra*, p. 6a). Thereafter, on August 10, 1960, the District Court entered its Findings of Fact and Conclusions of Law and its final

judgment and decree enjoining the petitioners from conducting the threatened strike. (R. 26-32). The judgment of the Court of Appeals for which review is sought by this petition affirmed the judgment and decree of the District Court. (Appendix C, *infra*, p. 22a) It did so upon the basic ground that the procedures of Section 3 of the Railway Labor Act are a complete substitute for the right to strike. The Court of Appeals further held that the Norris-LaGuardia Act, including Section 8 thereof, did not bar injunctive relief citing primarily *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Company*, 353 U.S. 30 (1957) for this conclusion. (Appendix C, *infra*, p. 15a)

REASONS FOR GRANTING THE WRIT

1. The Questions Presented By This Petition Are Clearly of Importance in the Administration of the Railway Labor Act and the Norris-LaGuardia Act

a. Railway Labor Act

In *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Company*, 353 U.S. 30 (1957) this Court stated as follows its reason for considering and deciding the question of whether a railway labor organization can resort to a strike over matters pending before the National Railroad Adjustment Board: (page 33)[3]

> "We granted certiorari in order to resolve an important question concerning interpretation and application of the Railway Labor Act."

The decision of the court below in the present case goes far beyond the problem involved in the *Chicago*

[3] In footnote 3 at page 33 the Court also noted that in addition to the importance of the question, there was a conflict in the decisions of the Courts of Appeals for the Fifth and Seventh Circuits.

River case and holds that the Railway Labor Act forbids a railway labor organization from resorting to a strike over contract violations by a railroad even though the organization has submitted the matter to the National Railroad Adjustment Board, that Board has determined that the railroad is violating the contracts involved and the railroad has refused to abide by the Board's decision. Thus, the judgment of the Court of Appeals presents questions which are of even greater importance in the administration of the Railway Labor Act than those considered by this Court in the *Chicago River* case.

The effect of the Court of Appeals decision upon the application of the Railway Labor Act is also so far-reaching that it should not be permitted to stand without review by this Court.

First: the decision below is premised upon the proposition that there can be no strike under any circumstances with respect to matters covered by Section 3 of the Railway Labor Act. Such proposition, which takes away completely the employees' common law right to strike with respect to these matters, involves a drastic interpretation of the Railway Labor Act entirely by implication and without the benefit of any express prohibition in the statute.

Second: the Court of Appeals decision completely destroys the intent of Section 3 as set forth by this Court in the following statement in the *Chicago River* case: (353 U.S. 34)[1]

[1] Any suggestion that this statement might be inapplicable to the present case because money awards are involved is refuted by the fact that nineteen of the twenty-one grievances giving rise to the disputes in the *Chicago River* case "were claims for additional compensation" (353 U.S. 32).

> "Section 3, First (m), declares that—'The awards of the several divisions of the Adjustment Board * * * shall be final and binding upon both parties to the dispute * * *'
>
> "This language is unequivocal. Congress has set up a tribunal to handle minor disputes which have not been resolved by the parties themselves. *Awards of this Board are 'final and binding upon both parties'.*" (Emphasis supplied)

The decision below has the effect of making Adjustment Board awards binding only on employees, rather than on both parties as this Court specifically stated is the statutory intent.

Third: the Court of Appeals decision undermines the basic purpose of Section 3 to obtain final and binding determinations by the Adjustment Board in matters under the Board's jurisdiction as such decision eliminates any incentive by railroads to abide by Board awards. The only risk which a railroad incurs under the decision below by refusing to honor an Adjustment Board award is the cost of further litigation which is no risk at all.

b. Norris-LaGuardia Act

The decision of the Court of Appeals upholds the use of injunctive power by the Federal courts against conduct which Section 4 of the Norris-LaGuardia Act (29 U.S.C. Section 104) has withdrawn from the injunctive power of such courts. The only case in which this Court has heretofore permitted the use of the injunctive power of the Federal courts against this type of conduct is in the *Chicago River* case where the injunction was used to preserve the jurisdiction of the Adjustment Board to decide matters pending before it.

The question of whether the federal injunctive power should be further extended to enjoin conduct which Section 4 of the Norris-LaGuardia Act has withdrawn from the authority of the Federal courts in a situation where the jurisdiction of the Adjustment Board has been exhausted and that Board has decided in favor of the employees presents a matter of substantial importance in the administration of that statute.

Moreover, the injunctive relief in the *Chicago River* case was granted to a railroad which had done all in its power to settle the dispute by submitting it to the Adjustment Board for decision. In the present case the beneficiary of the injunctive relief is a carrier which has refused to abide by Adjustment Board decisions and which has made no effort to settle the dispute but has instead stood upon a bare claimed legal right to force the employees through a further period of extended litigation. This situation gives rise to important questions concerning the proper interpretation and application of Section 8 of the Norris-LaGuardia Act which provides that no injunctive relief shall be granted to any complainant who has failed to make every reasonable effort to settle its labor disputes either by negotiation or with the aid of any governmental machinery or voluntary arbitration. Assuming *arguendo* that the respondent has, as it asserts, a legal right to refuse to abide by Adjustment Board decisions involved in the present case, the important problem is still present as to whether under such circumstances it has met the requirements of Section 8 for injunctive relief. Finally, even if the answer to this question is "yes", the further important question is presented as to whether respondent has met such requirements in a situation where it not only refused to abide

by the Adjustment Board decisions but made no effort to negotiate a settlement of the dispute with the Brotherhood prior to filing the injunction suit.

Both the District Court (Appendix B, *infra*, p. 13a) and the Court of Appeals (Appendix C, *infra*, p 21a) held Section 8 did not bar injunctive relief, relying principally on the *Chicago River* decision. Their judgments in substance limit Section 8 to a compliance only with legal requirements. It is submitted that the application of Section 8 to the present situation raises important questions not disposed of by the *Chicago River* case.

2. The Decision of the Court of Appeals is Directly in Conflict With Decisions of This Court Concerning the Application of the Railway Labor Act and the Norris-LaGuardia Act

a Railway Labor Act

The Court of Appeals, in rejecting the position of the employees that they were free to strike after having submitted the dispute to the National Railroad Adjustment Board and obtained favorable decisions which the respondent refused to honor, stated as follows: (Appendix C, *infra*, p. 20a)

> "With these contentions we cannot agree. We think that the rationale of the Supreme Court decisions is to the effect that the statutory proceedings before the Board in minor disputes provide an *appropriate and fair substitute for the right to strike*, and that the district court action provided in Section 3, First (p) of the Act is the enforcement procedure in the compulsory arbitration machinery adopted by Congress in the 1934 amendment." (Emphasis supplied)

The premise of the court below that Section 3 completely takes away the employees' right to strike over matters covered by such section is in direct conflict

with the decision of this Court in *Manion* v. *Kansas City Terminal Railway Company*, 353 U.S. 927 (1957) in which the Court vacated a lower court judgment enjoining a strike by a railway labor organization over grievances subject to Section 3, which had been processed through the property as required by that section, but were not pending before the National Railroad Adjustment Board. It is thus clear that there is some right to strike over matters covered by Section 3 and that the procedures of the section are not a complete substitute for the right to strike in any and all circumstances. Neither the Court of Appeals decision or that of the District Court refers to the *Manion* case, although they are clearly inconsistent with such decision and its application to the present situation was briefed and argued extensively by both petitioners and respondent to both courts. Moreover it is a companion case to the *Chicago River* decision upon which both courts principally rely.

The Court of Appeals decision also erroneously accepts the respondent's argument that this Court in the *Chicago River* case held that employees were compelled by the language of Section 3, First (i) to submit their grievances and disputes concerning the interpretation or application of collective bargaining agreements to the National Railroad Adjustment Board.[5] It does

[5] This argument is stated at page 15 of respondent's brief to the Court of Appeals to the effect that "if they (i.e. the employees) decide to progress claims beyond the property they must go to the Adjustment Board rather than strike." Respondent was compelled to make this argument since Section 3, First (i) provides that employees "may" submit disputes to the Adjustment Board, while Section 3, First (p) also provides that employees "may" file suit on their cause in an appropriate District Court. If the former provision does not require a submission by employees, it is difficult to justify such a requirement in the language of Section 3, First (p).

so in the following statement: (Appendix C, *infra*, p. 19a)

> "In Brotherhood of Railroad Trainmen v. Chicago River & Ind. R. R., supra, the Court reviewed the legislative history of the Act, and held that the 1934 amendment was intended to provide for compulsory arbitration in minor disputes so that a strike by employees could be enjoined for failure to submit to arbitration in accordance with the Act."

While it is true that this Court's opinion in the *Chicago River* case does use the phrase "compulsory arbitration" in reference to Section 3 (page 39), such opinion states that the ultimate question before the Court was "whether a railway labor organization can resort to a strike over matters *pending* before the Adjustment Board."[6] (page 31). It is thus clear that this Court did not in the *Chicago River* case hold that employees were required to submit their grievances to the National Railroad Adjustment Board, but only that once these grievances were submitted by either side so that Board jurisdiction attached, such jurisdiction cannot be defeated by a strike. The *Manion* case eliminates any argument to the contrary.

The clarification of the relationship of the *Manion* and *Chicago River* decision to the type of situation here involved calls for the review by this Court of the decision of the Court of Appeals.

The decision below is also contrary to the views expressed by this Court in *General Committee B.L.E. v. Missouri-K-T R. Co.*, 320 U.S. 323 (1943), in which the Court specifically interpreted the administrative

[6] Emphasis supplied.

machinery provided by Section 3 of the statute plus the statutory commands and prohibitions as simply supplementing the procedures of negotiation and self-help with specific legal sanctions. This interpretation of the effect of Section 3 is set forth at page 331 of the Court's opinion and reads as follows:

> "Moreover, administrative machinery was provided for the adjudication of certain controversies. Congress established the National Railroad Adjustment Board for the settlement of specific types of disputes or grievances between employees and the carrier. § 3, 45 USCA § 153, 10A FCA title 45, § 153. And Congress gave the courts jurisdiction to entertain suits based on the awards of the Adjustment Board. § 3, First, (p). That feature of the Act, as well as § 2, Ninth which placed on the Mediation Board definite adjudicatory functions, transferred labor problems from the realm of conciliation and mediation to tribunals of the law. *The new administrative machinery plus the statutory commands and prohibitions marked a great advance in supplementing negotiation and self-help with specific legal sanctions in enforcement of the Congressional policy.*" (Emphasis supplied)

It would be difficult to find a judical statement which more clearly sets forth the fact that Section 3, First (p) of the Railway Labor Act does not exclude employees from employing self-help to obtain redress for carrier violations of contracts but merely provides a legal sanction to supplement such self-help. The Court of Appeals decision does not mention the *M-K-T* case.

b. Norris-LaGuardia Act

The decision of the Court of Appeals conflicts with the decision of this Court in *Brotherhood of Railroad Trainmen* v. *Toledo, Peoria & Western Railroad*, 321 U.S. 50 (1944). In that case this Court held that Section 8 of the Norris-LaGuardia Act prohibited injunctive relief to a railroad which had discharged all of its legal obligations under the Railway Labor Act, but had not exhausted every reasonable effort to settle a dispute by available machinery (arbitration), even though the carrier was otherwise entitled to enjoin the conduct there involved. The District Court rejected the application of the *Toledo, Peoria & Western* decision to the present case on the ground that the procedures provided by the statute were exhausted by the Adjustment Board decisions. (Appendix B, *infra*, p. 13a) The Court of Appeals did not mention the decision.

It is submitted that a carrier which refuses to abide by an Adjustment Board decision has not met the requirements of Section 8, as spelled out in the *Toledo, Peoria & Western* decision. Petitioners can perceive no difference in the application of Section 8 between a carrier exercising a legal right to refuse to arbitrate a dispute and a carrier exercising a claimed legal right to refuse to abide by a decision in a dispute after submission of the dispute to the "compulsory arbitration" provisions of Section 3. The objection in each case is that the carrier's conduct has prevented a settlement of the dispute.

It is further submitted that this problem was not present in the *Chicago River* situation where the carrier had submitted the dispute to the Adjustment Board and the matter was pending before that Board.

Even if respondent's refusal to abide by the Adjustment Board decisions is not sufficient standing alone to disqualify it for injunctive relief under the *Toledo, Peoria & Western* decision, the railroad's action in thereafter relying on a claimed legal right and failing to make any effort to negotiate a settlement clearly brings it within the ambit of such decision.

3. The Decision of the Court of Appeals Is Contrary to the Plain Language of Both the Railway Labor Act and the Norris-LaGuardia Act.

a. Railway Labor Act

The plain language of Section 3, First (p) does not require employees to bring a suit in a Federal Court in cases where a railroad has refused to abide by an Adjustment Board decision. It only provides that employees "may" bring such a suit in that situation. The Court of Appeals decision is contrary to this plain language. It says that Section 3, First (p) is a substitute for the employees' common law right to strike and that the employee must bring such a suit or lose his right under the contract.

In the *Chicago River* case this Court stated (page 35) that the language of Section 3, First of the Railway Labor Act "should be literally applied in the absence of a clear showing of a contrary or qualified intention of Congress." In so speaking, the Court was referring to the language of Section 3, First (i) which provides that either party "may" submit a grievance or dispute concerning the interpretation or application of a collective bargaining agreement to the National Railroad Adjustment Board. In the *Manion* case decided two weeks later this Court applied the principle to the same statutory language and held in substance that it was permissive only.

The literal language of Section 3, First (p) (Appendix A, *infra*, p. 3a) likewise only provides that an employee "may" petition a District Court with respect to the causes for which he claims relief if a carrier refuses to abide by a decision of a National Railroad Adjustment Board. The application of the principle set forth by the Court in the *Chicago River* case for testing the meaning of the language of Section 3, First results in the conclusion that subsection (p) is permissive only and does not bar the common law right to strike which the employee has in the absence of statutory limitations. Such is the literal language of the subsection and there is no clear showing of a contrary intention of Congress.

Such a contrary intent cannot be derived from the fact that subsection (p), unlike subsection (i), gives the permissive right only to the employee. This intentional omission simply means that Congress did not give the carriers a right to judicial review of Adjustment Board decisions.

Nor can such a contrary intent be found in the legislative history of Section 3. The District Court made no mention of legislative history in its opinion (Appendix B, *infra*, p. 6a) The Court of Appeals referred to such history only in footnote 9 of its decision (Appendix C, *infra*, p. 20a) and then only as "set forth" in decisions of this Court, with particular emphasis upon the discussion in the *Chicago River* case.

In that case this Court reviewed such history (353 U.S. 35-39) and concluded that it was the understanding of both the opponents and supporters of Section 3 that it provided "compulsory arbitration in this lim-

ited field." These conclusions must be read in the context of and in support of the conclusions that this Court reached at 353 U.S. 34, quoted above at page 13, to the effect that the "unequivocal" language of Section 3, First (m) of the statute provides for a procedure to resolve disputes of the type here involved and makes Adjustment Board awards "final and binding upon both parties." In fact, the Court states at page 35 that the legislative history thereafter discussed "reinforces the literal interpretation of the Act." If, as respondent asserts, it is free to refuse to abide by Adjustment Board decisions, even the portion interpreting the contract,[7] then, of course, there can be no "compulsory arbitration." Such arbitration, as evidenced by Section 7-9 of the statute (45 U.S.C. Sections 157-159) contemplates awards "final and binding" on both parties subject only to impeachment on certain limited grounds.[8] It is submitted that it is inconsistent for the Court of Appeals to rely on the statement of this Court in the *Chicago River* decision with respect to the "compulsory arbitration" features of Section 3 and at the same time give no effect to this Court's statements in the same case that the "unequivocal" language of the statute makes Adjustment Board awards "final and binding on both parties." Under the Court of Appeals decision, Section 3 becomes "compulsory arbitration" only for the employees.

[7] The respondent has refused to correct the contract violations involved in Award 19372. (R. 44).

[8] Nor are the decisions of Courts of Appeals holding that in suits under Section 3, First (p) employees must try the grievance issue *de novo*, *B. P. Boos* v. *Railway Express Agency, Inc.*, 253 F. 2d 897 (8th Cir., 1958); *Thomas* v. *N. York, Chicago & St. Louis R. Co.*, 183 F. 2d 614, 618 (6th Cir., 1950) consistent with an arbitration concept.

Moreover, it is clear that this Court was not reviewing the history of Section 3 with the problem here involved in mind. Whatever may have been meant by those who described Section 3 in the Congressional hearings as something akin to arbitration the fact is that those same hearings clearly reveal that the drafters of the legislation did not know and in fact had not given any thought to the effect of the section with respect to strikes after Adjustment Board decisions are rendered. There was considerable discussion in the House hearings (pages 58-64)[9] on the right of an employee to strike after losing an Adjustment Board case. There was none in such hearings on the issue of such a right after the employee wins before the Adjustment Board although respondent, while conceding this to be generally true, has sought to construct a limited discussion out of isolated statements. Neither the District Court or the Court of Appeals has relied on these statements.

In any event, the following discussion at pages 63 and 64 of the House hearings, between Messrs. Wolverton and Federal Coordinator Eastman shows clearly that the drafters of the legislation had given no thought to the problem here involved:

> "Commissioner Eastman. I may say, so far as I am concerned, it had not seemed to me that matter was a contingency of importance, because I cannot conceive of organizations striking over the settlement of grievances, particularly when they had been passed upon by an impartial tribunal under Government auspices.
>
> "It is a serious enough thing to strike when a major matter is involved; but when your have only

[9] Hearings on H. R. 7630, House Committee on Interstate and Foreign Commerce, 73rd Cong., 2nd Sess.

minor grievances and they have had full opportunity to be heard and have had their day in court before a tribunal, it hardly seemed to me that that was a question that was likely to arise. My own idea would be, let that question arise out of experience and find out whether there is actual need for any such power before you provide for issuing injunctions for preventing strikes.

"Mr. Wolverton. Mr. Commissioner, that may be true. Maybe that is a proper course to pursue, but what I am seeking to find out is whether this language declares something else to be the policy.

"Commissioner Eastman. Yes.

"Mr. Wolverton. And, I am endeavoring to find out just what the language of this bill does provide, so that we may know what policy we are adopting. It may be that a hands-off policy is what we should adopt, but in that case, I do not want to see something in the bill that carries a different effect. That is the purpose of my questions, in trying to find out definitely what is the purpose or effect of the provisions of this bill.

"Commissioner Eastman. I shall be glad to give the matter study and let you know just what my opinion is upon it."

The legislative history contains no subsequent opinion by Mr. Eastman on the subject.

Neither the Senate hearings[10] nor the Committee reports[11] contain any mention of the subject.

[10] Hearings on S. 3266, Senate Committee on Interstate and Foreign Commerce, 73rd Cong., 2nd Sess.

[11] Report No. 1944, House of Representatives, 73rd Cong., 2nd Sess., June 11, 1934; Report No. 1065, Senate, 73rd Cong., 2nd Sess., May 21, 1934.

This legislative history does not furnish the "clear showing" which this Court stated in the *Chicago River* decision (353 U.S. 35) is necessary to override the literal language of Section 3, First (p).

b. Norris-LaGuardia Act

The clear language of Section 4 of the Norris-LaGuardia Act (29 U.S.C. Section 104) prohibits injunctions in labor disputes. No one has yet suggested that the dispute here involved is not a "labor dispute", as defined in Section 13(c) of that statute. The Court of Appeals decision (Appendix C, *infra*, p. 15a) does not mention Section 4 of such statute nor does it find "a plain violation of a basic command of the Railway Labor Act," the presence of which this Court stated is necessary to override the prohibitions of that section. *Railroad Telegraphers v. Chicago & N. W. R. Co.*, 362 U.S. 330, 338, 339 (1960).

Assuming *arguendo* that Section 4 does not prohibit the injunction here involved, Section 8 plainly does. That section specifically states that a complainant's duty extends beyond the discharge of mere legal obligations to settle a dispute. The dispute was settled by the "compulsory arbitration" machinery of Section 3, when the Adjustment Board handed down its decisions. Respondent had only to abide by such decisions. Whatever its legal right to refuse to do so, respondent's refusal disqualified it for injunctive relief by the plain language of Section 8.

Assuming further that this action alone was not sufficient to bring Section 8 into play, the further failure of respondent to negotiate a settlement and its stand

upon a claimed bare legal right is certainly contrary to the plain language of the section.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted

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APPENDIX A

STATUTES INVOLVED

Railway Labor Act

Section 1a (45 U.S.C. 151a):

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

Section 3, First (i) through (p) (45 U.S.C. 153, First (i) through (p)):

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall

give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them.

"(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however*, That final awards as to any such dispute must be made by the entire division as hereinafter provided.

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board

upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or other-

wise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

Norris-LaGuardia Act

29 U.S.C. Sections 104, 108, 113:

Section 104. "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

"(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

"(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 102 of this title."

* * * * *

Section 108. "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

* * * * *

Section 113. "When used in this chapter, and for the purposes of this chapter—

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is

sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

"(d) The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia."

APPENDIX B

Opinion of the United States District Court for the District of Colorado
185 F. Supp. 369

CHILSON, District Judge.

The essential facts are not controverted.

The Brotherhood of Railroad Trainmen, in accordance with the Railway Labor Act (44 Stat. 577, 45 U.S.C.A. § 151 et seq.), submitted to the National Adjustment Board certain claims of some of its members for additional pay, growing out of the interpretation or the application of pre-existing contracts of employment entered into between the Brotherhood and The Denver and Rio Grande Western Railroad Company.

In December, 1959 and January, 1960, the National Adjustment Board made money awards in favor of the employees, and entered orders for the railroad to pay the

first award on or before January 17, 1960 and the second award on or before February 20, 1960.

The railroad refused to make payment.

On May 16, 1960, the employees went on strike to enforce payment of the awards. The railroad brought this action to enjoin the strike. A preliminary injunction was entered and the issue now before the Court is whether or not a permanent injunction should issue.

The Railway Labor Act [45 U.S.C.A. § 153 First (p)] provides in essence that if a carrier does not comply with an order of the Adjustment Board of the kind here involved, the employees may file an action in the District Court of the United States to enforce the award.

The railroad contends that such a court action is the sole means by which an award of the Board may be enforced.

The Brotherhood makes two contentions; first, that the employees' rights of enforcement are not limited solely to a court action, but that they have the alternative right to enforce the award by strike. Secondly, the Brotherhood contends that the Norris-LaGuardia Act (29 U.S.C.A. §§ 101-115) prohibits this Court from granting injunctive relief to prevent a strike to enforce the awards.

Although the United States Supreme Court has not had occasion to pass upon the first question here involved, namely: whether or not the employees' sole means of enforcement of such an award is by resort to the court, the United States Supreme Court has on more than one occasion reviewed the purpose and Congressional intent of the Railway Labor Act and the 1934 amendments thereto. [See Elgin, Joliet and Eastern Railway Co. v. Burley, 1945, 325 U.S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886; Brotherhood of Railroad Trainmen et al. v. Chicago River and Indiana Railroad Co. et al., 1957, 353 U.S. 30, 77 S. Ct.

635, 1 L. Ed. 2d 622; Union Pacific Railroad Co. v. Price, 1959, 360 U.S. 601, 79 S. Ct. 1351, 3 L. Ed. 2d 1460.]

From the Court's construction of the Railway Labor Act in the foregoing cases, it is clear that the Act recognizes two classes of controversy which are traditionally referred to as the "major" and "minor" disputes of the railway labor world.

[1] "Major" disputes relate to the disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement, or where it is sought to change the terms of one. They look to acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

[2] "Minor" disputes contemplate the existence of a collective agreement already concluded, and the dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation. In other words, a minor dispute relates to rights accrued and not merely to have new ones created for the future.

The Railway Labor Act as amended in 1934 marks out two distinct routes for settlement of the two classes of disputes.

Major disputes, if not settled by negotiation, go first to mediation under the National Mediation Board; if that fails, then to acceptance or rejection of arbitration, and finally, to possible presidential intervention. But as to major disputes, compulsion goes only to insure that these procedures are exhausted before resort can be had to self-help such as strikes. No authority is empowered to decide the dispute, and no such power is intended unless the parties themselves agree to arbitration.

[3] The course prescribed for the settlement of minor disputes is very different beyond the initial stages of negotiation. Thereafter the Act does not leave the parties wholly free at their own will to agree or not to agree. On

the contrary, one of the main purposes of the 1934 amendments to the Railway Labor Act was to provide a more effective process of settlement.

An Adjustment Board was created to remove the settlement of minor disputes from a deadlock resulting from non-agreement of the parties, and to bring them within a general and inclusive plan of decision. The aim was not to dispense with agreement. It was to aid decision where agreement fails, and thus to safeguard the public as well as private interests against the harmful effects of a deadlock.

In this case we have a minor dispute.

The Railway Labor Act provides as to minor disputes that if the negotiations provided for in the Act do not result in an agreement, the dispute may be referred by either party to the National Adjustment Board [45 U.S.C.A. § 153 First (i)].

In accordance with this provision, the employees, through the Brotherhood, did submit the dispute to the Board. The Board made its award consisting of a money award to be paid by the railroad to the employees.

45 U.S.C.A. § 153 First (m), states that the awards of the Board shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award.

45 U.S.C.A. § 153 First (o) authorizes the Board to make an order directed to the railroad to make the award effective, and if the award includes a requirement for payment of money, the order will require payment to the employee on or before a day named.

Such an order was made in this case.

Title 45 U.S.C.A. § 153, First (p) recognizes the possibility that the railroad might not comply with the Adjustment Board's order, and provides in effect that if

the carrier does not comply with the order of the Board within the time prescribed, the employees may bring an action in the United States District Court for enforcement of the award.

This is the only step provided by the Railway Labor Act which has not been taken by the employees in this particular dispute, and the employees contend that they are not limited to this prescribed procedure to enforce the award but may employ other means to do so.

As previously noted, the Supreme Court has not decided this precise question, but the Court, in its consideration of the Railway Labor Act, has pointed the way to the answer to the question here involved.

In Elgin, Joliet and Eastern Railway Co. v. Burley, supra, it was contended that the award of the Adjustment Board amounts to nothing more than an advisory opinion, and, therefore, the parties were entirely free to ignore the Board's decision and seek other means to determine their dispute. The Court said [325 U.S. 711, 65 S. Ct. 1288]:

> "At the outset we put aside this broadest contention as inconsistent with the Act's terms, purposes and legislative history."

In the case of Slocum et al. v. Delaware, Lackawanna and Western Railroad Co., 339 U.S. 239, at page 244, 70 S. Ct. 577, at page 580, 94 L. Ed. 795, the Supreme Court, in speaking of the application of the Railway Labor Act to a minor dispute, said:

> "We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive."

In the case of Pennsylvania Railroad Co. v. Day, 360 U.S. 548, 79 S. Ct. 1322, 1325, 3 L. Ed. 2d 1422, the Supreme Court, again speaking of minor disputes, said:

"Our consistent regard for the importance of having disputes between railroad employees and carriers settled by the administrative Board which Congress established for that purpose requires respondent to resort to the NRAB for adjudication of his claim."

In the case of Brotherhood of Railroad Trainmen et al. v. Chicago River and Indiana Railroad Co. et al., supra [353 U.S. 30, 77 S. Ct. 640] the Supreme Court reviewed the history and purposes of the 1934 amendments to the Railway Labor Act pertaining to the settlement of minor disputes, and stated without dissent,

"This record is convincing that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field."

It is clear then that the procedures prescribed by the Railway Labor Act to arrive at a decision of a minor dispute are exclusive.

It is urged by the Brotherhood, however, that the procedure prescribed by the Act for the enforcement of the decision, as opposed to the procedure to obtain a decision, is not exclusive.

With this position this Court cannot agree.

"The purpose of the Railway Labor Act was to provide a framework for peaceful settlement of labor disputes between carriers and their employees to 'insure to the public continuity and efficiency of interstate transportation service, and to protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failures of managers and employees to settle peaceably their controversies.'" Union Pacific Railroad Co. v. Price, 360 U.S. 601, at page 609, 79 S. Ct. 1351, at page 1356, 3 L. Ed. 2d 1460.

To hold that the procedures for decision are exclusive and that the procedure for enforcement is not exclusive

would be inconsistent with the purposes of the Act. The injury to the public is the same whether the interruption of interstate commerce is for the purpose of obtaining a decision or for the purpose of enforcing a decision. To permit the interruption of service for the purpose of enforcing a decision of the Adjustment Board, when the Act itself provides a remedy for such enforcement, would defeat the essential purposes of the Act.

The Supreme Court, in considering the Railway Labor Act has said,

> "The specification of one remedy normally excludes another." Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297-301, 64 S. Ct. 95-97, 88 L. Ed. 61; Union Pacific Railroad Co. v. Price, 360 U.S. 601-608, 79 S. Ct. 1351-1355, 3 L. Ed. 2d 1460.

The Court concludes that Congress having provided a means of enforcement of the Board's award by court action, the prescribed procedure excludes any other means of enforcement, including enforcement by strike.

[4] The Brotherhood asserts that the provision of the Act for enforcement of the award through Court [45 U.S.C.A. § 153 First (p)], affords the railroad an opportunity to relitigate the issues decided by the Adjustment Board, while the employee has no resort to the court to relitigate the issues if the award is adverse to him.

The assertion is correct, and the situation has led to a division of opinion within the Supreme Court and dissenting opinions in the cases of Pennsylvania Railroad Co. v. Day, 360 U.S. 548, at page 554, 79 S. Ct. 1322, at page 1325, 3 L. Ed. 2d 1422, and Union Pacific Railroad Co. v. Price, 360 U.S. 601, at page 617, 79 S. Ct. 1351, at page 1360, 3 L. Ed. 2d 1460.

However, the law which governs this Court is stated in the majority opinion in Union Pacific Railroad Co. v. Price, supra, as follows:

> "The disparity in judicial review of Adjustment Board orders, if it can be said to be unfair at all, was explicitly created by Congress, and it is for Congress to say whether it ought to be removed." Union Pacific Railroad Co. v. Price, supra, 360 U.S. at page 615, 79 S. Ct. at page 1359.

We turn now to a consideration of the application of the Norris-LaGuardia Act to this case.

The railroad contends that the Norris-LaGuardia Act does not apply to settlement of minor disputes under the Railway Labor Act, and therefore the provisions of the Norris-LaGuardia Act do not prohibit injunctive relief in this case.

[5] The employees first contend that the Norris-LaGuardia Act prohibits injunctive relief, except in cases where the mandatory provisions of the Railway Labor Act have been violated. Assuming this to be a correct statement of the application of the Act, the Court's determination that the remedy for the enforcement of the awards prescribed by the Act is exclusive, brings this case within the exception stated.

The employees next contend that the Norris-LaGuardia Act prohibits injunctive relief, because the carrier has not gone beyond its legal obligations under the Act and made additional efforts to settle the dispute (page 6, Defendants' Supplemental Memorandum). Defendants cite in support of this position the case of Brotherhood of Railroad Trainmen, etc. v. Toledo, Peoria and Western Railroad, 321 U.S. 50, 64 S. Ct. 413, 88 L. Ed. 534. Injunctive relief was denied in that case because the carrier did not see fit to use one of the means provided by the Act to settle the dispute, namely: arbitration. This Court cannot read into that decision a requirement

that the carrier must go beyond the procedures provided in the Act.

In this case the procedures provided by the Act to obtain a decision have been exhausted and a decision has been obtained. The carrier is not required to enter into further negotiations in an attempt to compromise the awards which have been made before it can apply for injunctive relief.

In considering the application of the Norris-LaGuardia Act to a minor dispute such as the one here involved, the Supreme Court has said:

> "The only question which remains is whether the federal courts can compel compliance with the provisions of the Act to the extent of enjoining a union from striking to defeat the jurisdiction of the Adjustment Board. The Brotherhood contends that the Norris-LaGuardia Act has withdrawn the power of federal courts to issue injunctions in labor disputes. That limitation, it is urged, applies with full force to all railway labor disputes as well as labor controversies in other industries.
>
> "We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable." Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Co., 353 U.S. 30, at page 39, 77 S. Ct. 635, at page 640, 1 L. Ed. 2d 622.

The Court in the same opinion (353 U.S. at page 41, 77 S. Ct. at page 641) further stated:

> "In Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 [72 S. Ct. 1022, 96 L. Ed. 1283], and other similar cases, the Court held that the specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-LaGuardia Act.

"'Our conclusion is that the District Court has jurisdiction and power to issue necessary injunctive orders [to enforce compliance with the requirements of the Railway Labor Act] notwithstanding the provisions of the Norris-LaGuardia Act.' Id., [343 U.S.] at [page] 774, [72 S. Ct. at page 1025]."

This Court concludes it has injunctive power in this case, and a permanent injunction should issue.

APPENDIX C

Opinion of the United States Court of Appeals for the Tenth Circuit

Before MURRAH, Chief Judge, PICKETT, Circuit Judge, and KERR, United States District Judge.

PICKETT, Circuit Judge.

* * * * * * *

This is an appeal from a decree of the United States District Court for the District of Colorado, permanently enjoining the defendants[1] from conducting a strike against the plaintiff's railroad to enforce payment of money awards made by the National Railroad Adjustment Board in favor of some of the railroad's employees who are members of the Brotherhood. The principal question for determination is whether the remedies provided in Section 3 of the Railway Labor Act, 45 U.S.C.A. § 151 et seq., are exclusive and deny to the employees or their representatives the right to call a strike to enforce the awards made by the Board. We agree with the trial court that the strike call was illegal because in disputes of the nature here involved, the statutory remedy is exclusive, and the Board's money award may be enforced only by an action in the United States

[1] The defendants are the Brotherhood of Railroad Trainmen, the local lodges, and their officers.

District Court as provided for in Section 3, First (p) of the Act. 45 U.S.C.A. § 153, First (p).[2]

The facts have been stipulated, and the findings of fact are not questioned here. The dispute arose under collective bargaining agreements governing the terms and conditions of employment of the employees represented by the Brotherhood. A number of the employees claimed that, under the provisions of the agreement, they were entitled to compensation for services rendered in addition to their regular duties. The Railroad denied the claims, and the employees resorted to the statutory procedure which resulted in money awards being made to the employees by the proper division of the National Railroad Adjustment Board. The Railroad refused to honor the awards, and a strike was called, which, if carried out, would seriously affect the

[2] 45 U.S.C.A. § 153, First (p) reads:

"If a carrier does not comply with an order of a division of the adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated; and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expense of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

Railroad's operation.[3] Upon application of the Railroad, the District Court temporarily enjoined the strike, and upon hearing the injunction was made permanent. Denver & R. G. W. R. R. v. Brotherhood of Railroad Trainmen, (Colo.) 185 F. Supp. 369.

The purposes of the Act are set forth therein,[4] and they have been stated in numerous Supreme Court decisions, a detailed recount of which would serve no useful purpose here. It suffices to say that the primary purpose of the Act and the 1934 Amendment thereto was to avoid interruption of commerce by promoting industrial peace, stabilizing the relationship between labor and management, and eliminating, as far as possible, the danger of strikes on the nation's railroads. Pennsylvania R.R. v. Day, 360 U.S.

[3] The Railroad is a common carrier, operating a system consisting of approximately 2100 miles of track, in both interstate and intrastate commerce, with main lines extending from Denver, Colorado Springs and Pueblo, Colorado, to Salt Lake City and Ogden, Utah, and with numerous branches on the main line. It has approximately 5,000 employees, investments in excess of $250 million, and a gross revenue from freight and passenger operations of approximately $75 million annually. It is an important part of the national railway system.

[4] 45 U.S.C.A. § 151a provides:

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

548; Union Pac. R.R. v. Price, 360 U.S. 601;[5] Brotherhood of Railroad Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30.

Disputes over the interpretation or application of provisions of existing collective bargaining agreements have been generally referred to as "minor" disputes to distinguish them from those growing out of negotiations to reach an agreement on a contract relating to the future, which disputes are characterized as "major."[6] The latter usually affect the pay and working conditions of an entire class of employees. For the settlement of these two classes of dispute the statute fixes two distinct methods. Brotherhood of Railroad Trainmen v. Chicago River & Ind. R.R., supra; Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 722. When there is a failure to settle major disputes, after exhausting the statutory remedies, the employees are free to resort to economic duress. Telegraphers v. Chicago & N. W. R., 362 U.S. 330, 341; Elgin, J. & E. Ry. v. Burley, supra, at 725.

[5] The Union Pac. R.R. v. Price, 360 U.S. 601, 609, the court said:

"The purpose of the Railway Labor Act was to provide a framework for peaceful settlement of labor disputes between carriers and their employees to 'insure to the public continuity and efficiency of interstate transportation service, and to protect the public from the injuries and losses contingent upon any impairment or interruption of interstate commerce through failures of managers and employees to settle peaceably their controversies.' * * *"

[6] The trial court defined the nature of these disputes as follows:

"'Major' disputes relate to the disputes over the formation of collective agreements or efforts to secure them. They arise when there is no such agreement, or where it is sought to change the terms of one. They look to acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

"'Minor' disputes contemplate the existence of a collective agreement already concluded, and the dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation. In other words, a minor dispute relates to rights accrued and not merely to have new ones created for the future." Denver & R.G.W.R.R. v. Brotherhood of Railroad Trainmen, (Colo.) 185 F. Supp. 369, 371.

But, as to minor disputes the statutory scheme for settlement is different. The law is well settled that "the jurisdiction of the Board to adjust such grievances and disputes of the type here involved is exclusive",[7] and the employees may be enjoined from striking over such disputes after they have been submitted to the Adjustment Board. In Brotherhood of Railroad Trainmen v. Chicago River & Ind. R.R., supra, the Court reviewed the legislative history of the Act, and held that the 1934 amendment was intended to provide for compulsory arbitration in minor disputes[8] so that a strike by employees could be enjoined for failure to submit to arbitration in accordance with the Act.

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[7] Slocum v. Delaware, L. & W. R.R., 339 U.S. 239, 244.

[8] In Brotherhood of Railroad Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 34-35, it was said:

"Section 3, First (m), declares that—

'The awards of the several divisions of the Adjustment Board . . . shall be final and binding upon both parties to the dispute . . . .'

"This language is unequivocal. Congress has set up a tribunal to handle minor disputes which have not been resolved by the parties themselves. Awards of this Board are 'final and binding upon both parties.' And either side may submit the dispute to the Board. The Brotherhood suggests that we read the Act to mean only that an Adjustment Board has been organized and that the parties are free to make use of its procedures if they wish to; but that there is no compulsion on either side to allow the Board to settle a dispute if an alternative remedy, such as resort to economic duress, seems more desirable. Such an interpretation would render meaningless those provisions in the Act which allow *one* side to submit a dispute to the Board, whose decision shall be final and binding on *both* sides. If the Brotherhood is correct, the Adjustment Board would act only if the union and the carrier were amenable to its doing so. The language of § 3, First, reads otherwise and should be literally applied in the absence of a clear showing of a contrary or qualified intention of Congress.

"Legislative history of the provisions creating the National Railroad Adjustment Board reinforces the literal interpretation of the Act. The present law is a composite of two major pieces of legislation. Most of the basic framework was adopted in 1926. In 1934 after eight years of experience, the statute was amended, and in that amendment the Adjustment Board was born." Footnotes omitted.)

The contention here is that since the employees did submit their disputes to the Adjustment Board, which made money awards in their favor, the failure of the Railroad to honor the awards leaves them free to strike. This position is premised upon the corollary contention that the provision authorizing an action to be brought in the federal district court is not mandatory. With these contentions we cannot agree. We think that the rationale of the Supreme Court decisions is to the effect that the statutory proceedings before the Board in minor disputes provide an appropriate and fair substitute for the right to strike, and that the district court action provided in Section 3, First (p) of the Act is the enforcement procedures in the compulsory arbitration machinery adopted by Congress in the 1934 amendment.[9] It therefore is the

[9] The history of the legislation as set forth in Union Pac. R.R. v. Price, 360 U.S. 601; Brotherhood of Railroad Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30; and Elgin, J. & E.R. v. Burley, 325 U.S. 711, sustains this conclusion. In the case "Chicago River" the court, after referring to the pertinent legislative history of changes brought about by the 1934 amendments said:

"The change was made with the full concurrence of the national railway labor organizations. Commissioner Joseph B. Eastman, Federal Coordinator of Transportation and principal draftsman of the 1934 bill, complimented the unions on conceding the right to strike over 'minor disputes' in favor of the procedures of the Adjustment Board:

> 'The willingness of the employees to agree to such a provision is, in my judgment, a very important concession and one which full advantage should be taken in the public interest. I regard it as, perhaps, the most important part of the bill.' (Footnote omitted.)

The Court continued, at page 39:

"This record is convincing that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field. Our reading of the Act is therefore confirmed, not rebutted, by the legislative history."

only course to be followed in obtaining the enforcement of money awards.

In Union Pac. R.R. v. Price, supra, it was held that a railroad employee could not maintain a common law action for damages on a claim which had been denied by the Board, even though a carrier has a statutory right to relitigate money awards which the Board has directed it to pay. It is quite obvious that Congress thought that the statutory method for enforcing the Board's money awards in favor of employees was preferable to the devastating effect of an interruption of interstate commerce caused by a strike on a portion of the nation's railroad system. It is true that the Act does not provide a judicial review of the Board's actions when the employee is unsuccessful, but if this provision creates an unfair disparity, as the Supreme Court said in Union Pac. R.R. v. Price, supra, "it is for Congress to say whether it ought to be removed."

It is urged that the injunction entered in this case is prohibited by Section 8 of the Norris-LaGuardia Act, 29 U.S.C.A. § 108. We think this question was answered in the case of Brotherhood of Railroad Trainmen v. Chicago River & Ind. R.R. supra, in which it was held that the general terms of the Norris-LaGuardia Act could not be read alone in matters dealing with railway labor disputes, and that it did not prevent injunctions to prohibit strikes growing out of minor disputes which were specifically dealt with in the Railway Labor Act. See also Brotherhood of Locomotive Engineers v. Missouri-Kan.-Tex. R.R., 363 U.S. 528; and Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768. Cf. Chauffeurs, Teamsters, etc. v. Yellow Trans. Frgt. Lines, 10 Cir. 282 F. 2d 345.

Affirmed.

Judgment

Sixteenth Day, March Term, Thursday, April 13, 1961.

Before Honorable Alfred P. Murrah, Chief Judge, Honorable John C. Pickett, Circuit Judge, and Honorable Ewing T. Kerr, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

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No. 979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

BROTHERHOOD OF RAILROAD TRAINMEN, *et al.*,

Petitioners,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

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OCTOBER TERM, 1960

No. 979

BROTHERHOOD OF RAILROAD TRAINMEN, *et al.*,
Petitioners,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the court of appeals (Pet. 15a-21a) is not yet officially reported. The district court's opinion (Pet. 6a-15a) is reported in 185 F. Supp. 369. The district court's oral opinion of July 27, 1960, appears at R. 45-48. Its findings of fact, conclusions of law, and permanent injunction appear at R. 26-32.

Jurisdiction

The judgment of the court of appeals was entered on April 13, 1961 (Pet. 22a). The petition for a writ of certiorari was filed on May 18, 1961. The jurisdiction of this Court has been invoked under Section 1254 of the Judicial Code.

Questions Presented

1. Whether the enforcement suit remedy provided by

the Railway Labor Act is the exclusive means for enforcing awards of the National Railroad Adjustment Board.

2. Whether a strike over an Adjustment Board award may be enjoined in order to enforce the Railway Labor Act.

Statutes Involved

The pertinent provisions of the Railway Labor and Norris-La Guardia Acts appear in the Appendix, *infra*, pp. 16-18.

Statement

The facts as stated by petitioners are largely uncontroverted and for the most part need not be restated here. However, it should be noted that the strike was not merely "threatened" since petitioners had already commenced their strike and it was not halted until several hours after the temporary restraining order was issued (R. 29, 37, Pet. 7a; cf. Pet. 3, 4, 9, 10). Petitioners' extensive discussion of the merits of the two awards of the Adjustment Board and the references to respondent as a contract violator (Pet. 2, 3, 4, 5-7, 8, 12, 18) require a brief answer too, even though the validity of the awards is not an issue in the present suit.

By quoting carefully selected portions of Award No. 15389 (R. 15-18), petitioners seek to create the impresion that the respondent carrier's actions were in flagrant violation of a well-settled working rule. They neglect to state that the identical issue (the use of head brakemen to herd engines from an inbound train to the tie-up track at North Yard, Denver) had previously been submitted by agreement of the parties to a Special Board of Adjustment (R. 17). Although petitioners agreed that the Special Board's decision would be "final and binding" and would "cover all claims of crews on subsequent dates" (see R. 18),

when the Special Board decided in favor of the carrier in 1952, petitioners ignored their agreement and raised again the very claim which had been rejected by the Special Board. Despite respondent's good faith reliance on the decision which petitioners had agreed would be final and binding (R. 17, 18), the National Railroad Adjustment Board in Award 19389, with five members dissenting, sustained claims for penalties against respondent (R. 18). Referee Sembower said that "each claim must be approached individually as an *ad hoc* matter," even though inconsistent awards resulted (R. 17). The nine claimants were awarded an extra day's pay for each day a head brakeman was required to do the work in question (R. 15, 18-19) although the work requires one employee only a few minutes to perform. After Award No. 19389 was rendered, the carrier ceased the practice complained of (R. 43), and the only remaining controversy is in regard to the payment of the monetary claims. Respondent during the period these claims arose was acting in reliance on the award of the Special Board of Adjustment and the agreement submitting the disputes to that tribunal (R. 17, 18).

Similarly, as to Award 19372 (R. 12-14), in which five Adjustment Board members also dissented, petitioners present only their side of the merits. They neglect to reveal that a provision of the collective bargaining contract empowered respondent to establish "new runs, or new assignments," and that the new assignment did not reduce the employees' earnings or impose additional hardships on them (see R. 13).

Out of 1,045 Adjustment Board or Special Board awards involving respondent since 1934 under the Railway Labor Act, respondent has honored all but these two plainly improper awards (R. 38). Accordingly, the epithets applied to respondent with respect to both awards, totalling an estimated $750,000, are unjustified.

Argument

Applying the decisions of this Court in *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, and *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U.S. 30, the court below correctly held that the Railway Labor Act prohibits strikes over minor grievances, and that Section 3 First (p), providing for enforcement suits, furnishes the exclusive means for enforcing awards of the National Railroad Adjustment Board. Moreover, it is settled that the Norris-La Guardia Act does not prevent the courts from enforcing the Railway Labor Act. There is no conflict of decisions. Therefore the standards justifying the issuance of a writ of certiorari have not been satisfied.

1. In accord with the General Purposes enumerated in Section 2 of the Railway Labor Act, the duty imposed by Section 2 First on employees and carriers to exert every reasonable effort to settle disputes arising out of the application of agreements in order to avoid interruptions to commerce means that the statutory remedies for peacefully resolving controversies must be exhausted.[1] Section 3 First (p), set out in full, *infra*, pp. 17-18, is such a remedy, specifically provided for the kind of dispute involved here over compliance with an award of the Adjustment Board. Petitioners' failure to exhaust this remedy precludes a strike. The enforcement machinery was selected by Congress in 1934 as an appropriate and fair substitute

[1] See *Elgin, Joliet and Eastern R. Co.* v. *Burley*, 325 U.S. 711, 725; *Norfolk & Portsmouth Belt Line Rr Co.* v. *Brotherhood of Railroad Trainmen*, 248 F. 2d 34, 45 (C.A. 4, 1957), certiorari denied, 355 U.S. 914; *Brotherhood of Railway and Steamship Clerks* v. *Railroad Retirement Board*, 239 F. 2d 37, 41, 42 (C.A. D.C., 1956); *American Airlines, Inc.* v. *American Air Line Pilots Assn.*, 169 F. Supp. 777, 783-789 (S.D.N.Y., 1958); *Chicago, R.I. & P.R. Co.* v. *Switchmen's Union*, 187 F. Supp. 581 (W.D.N.Y., 1960).

for the right to strike to enforce awards. As this Court stated in discussing the 1934 amendments relating to minor disputes, "the employees were willing to give up their remedies outside of the statute provided that a workable and binding statutory scheme was established to settle grievances." *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 613. The remedy in Section 3 First (p) for court enforcement was designed to bar resort to strikes, for in the Railway Labor Act "the specification of one remedy normally excludes another." 360 U.S. at p. 608; *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301. Employees may not strike over unfavorable awards under the *Price* case (360 U.S. at p. 611, note 10). *A fortiori* they may not strike to enforce a favorable award, for there Congress has provided the peaceful remedy of an enforcement suit.

Petitioners, however, argue that the word "may" used in Section 3 First (p) shows that the enforcement suit provision is merely permissive (Pet. 20-21). In the *Chicago River & Indiana* case the identical argument was made with respect to Section 3 First (i) which also uses the word "may" in connection with submissions to the Adjustment Board, but this argument was rejected by the Court in a unanimous decision which held that the Trainmen's contention would render Section 3 First "meaningless." 353 U.S. at p. 34. It has subsequently been held that employees normally *must* submit their claims to the Adjustment Board, notwithstanding the use of "may" in Section 3 First (i). *E.g., Pennsylvania R. Co.* v. *Day*, 360 U.S. 548. The "may" argument was also rejected in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239.

The word "may" was selected to show that employees are not compelled to progress their grievances beyond the property, or, as here, beyond the Adjustment Board. However, if they do decide to progress claims beyond the prop-

erty they must go to the Adjustment Board rather than strike, and if they wish to enforce awards they must go to the District Court in an enforcement suit rather than strike. Where, on the other hand, Congress intended a remedy to be altogether permissive in the sense that either party could avoid resort to it without abandoning its demands, specific language was chosen to make this clear. Section 7 First of the Railway Labor Act says that a controversy "may . . . be submitted to the arbitration of a board." But Congress did not stop there; in order to show that arbitration was voluntary the words "by agreement of the parties" were added and also the proviso that the refusal to agree to arbitration "shall not be construed as a violation of any legal obligation." *Infra*, p. 18.

The legislative history and contemporary understanding of the Railway Labor Act also support the decision below. The 1934 amendments added Section 3 First (p) which made Adjustment Board awards enforceable in court. It was recognized that strikes over minor grievances were now unnecessary. When questioned about that right to strike after a decision by the Adjustment Board, Commissioner Eastman, the draftsman of this legislation, stated that "there ought not to be strikes with reference to minor grievances of that sort. I should be very unwilling to take away from the employees the right to strike on major issues, but these are not major issues." Hearings before the House Committee on Interstate & Foreign Commerce on H.R. 7650 (73d Cong., 2d Sess.) p. 61.

The following colloquy was to the same effect:

> "Mr. Pettingill. Your interpretation there, Mr. Commissioner would be that under the language at the bottom of page 17, although the individual may be free to walk out, the organization would not be free to call a strike after an award had been made on those mat-

ters that are covered by the language at the bottom of page 17.

"Commissioner Eastman. Well, that is my understanding; yes sir." (House Hearings, p. 59).

Mr. Carmalt, Eastman's legal advisor, was also of the opinion "that there should not be the right to strike over grievances of this kind" and "that the implication lay from the form of the bill that a strike on account of these minor grievances would not be permitted and might be enjoined. . . . Such an injunctive process as might be necessary to prevent the strike growing out of the settlement of grievances under Section 3, I should believe would be." *Id.* at pp. 62-63.

The principal focus of this discussion was on strikes against Adjustment Board decisions unfavorable to employees. In this situation a strike would be the only recourse a union has, since the Act does not permit employees to obtain judicial review of unfavorable decisions of the Board. *Union Pacific R. Co.* v. *Price*, 360 U.S. 601; *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548. Naturally the denial of the right to strike where an employee has no other recourse was a matter of particular concern to certain Congressmen whose questions prompted the remarks quoted above. Where employees have the right to sue for enforcement of favorable awards, as here, the prohibition on strikes was less drastic and there was less reason for extended comment or questioning. Nevertheless, the above answers of Messrs. Carmalt and Eastman show that they intended there should be no strikes in minor disputes generally. Most significantly, when Commissioner Eastman was asked about enjoining strikes over awards, he said:

"I cannot tell you what the legal procedures would be in enforcing the award, where it is against the em-

ployee. *Paragraph (p) [Section 3 First (p)] covers the case where the carrier does not comply with the order of the adjustment board.*" (Emphasis added; p. 60).

When Mr. Cooper suggested this was "something new," Commissioner Eastman said "exactly similar provisions" were in the current law with respect to arbitration "and this law is in effect an agreement on the part of the parties to arbitrate all these minor disputes. . . . The willingness of the employees to agree to a provision of that sort seemed to me to be a very important and praiseworthy thing." *Ibid.* His final remarks on the problem were that Section 3 First does "provide for compulsory adjustment of individual grievances" in order to avoid strikes (78 Cong. Rec. 12375; cf. Pet. 24).

These statements indicate that however controversial the outlawing of strikes against unfavorable awards might be,[2] it was understood that Section 3 First (p) "covers the case" involved here. Adjustment Board awards would thus be enforced without strikes as are arbitration awards in major disputes, but *all* minor disputes would be so handled. This "very important and praiseworthy" concession by employees would be meaningless if, as petitioners insist, labor organizations can disregard these provisions whenever they see fit.

The understanding of the labor movement in 1934 when the Railway Labor Act amendments were passed is shown in an article written by George Harrison in the October 1934 issue of the *American Federationist*. Mr. Harrison

[2] The Railway Labor Act does in fact outlaw such strikes. *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 610-611, note 10. This answers the very question as to which Commissioner Eastman expressed doubt (Pet. 24).

pointed out that under the new law, Adjustment Board awards were enforceable in court:

> "The power to enforce decisions of the National Board of Adjustment has been criticized by some on the ground that it constitutes compulsory arbitration. This is denied by the railway labor organizations, who point out that the National Board of Adjustment has jurisdiction only over grievances that arise out of the application and interpretation of rules. The settlement of such grievances and the enforcement of decisions of the adjustment board is merely applying the judicial process to the adjudication of grievances. The fundamental proposition of *changes* in wages, hours and working conditions is still a matter of direct negotiation between the carriers and the unions representing the employees. The mediation and arbitration provisions of the original Railroad Labor Act remain intact, and arbitration in these matters is purely voluntary." (p. 1057) (Italics in original).

If the draftsmen had intended Sections 3 First (p) and 3 First (i) to be voluntary remedies which unions could ignore, Mr. Harrison would have so stated in answer to the criticism of compulsory arbitration. Instead he defended these provisions by saying they applied only to minor disputes; that though grievances were to be governed by "the judicial process," arbitration *in major disputes* was still "purely voluntary." Mr. Harrison appeared at both the Senate and House Hearings on the 1934 Act as chairman of the legislative committee of the Railway Labor Executives' Association.

Petitioners attempt to magnify the importance of the Railway Labor Act issue (Pet. 11-13) without even mentioning the controlling case of *Union Pacific R. Co.* v. *Price*, 360 U.S. 601. In holding there that employees may not obtain judicial review of unfavorable awards, the Court noted that they may not strike over unfavorable awards.

360 U.S. at p. 611, note 10. *A fortiori* they may not strike to enforce a favorable award, for there Congress has provided the peaceful remedy for an enforcement suit. Moreover, in *Pennsylvania R. Co. v. Day*, 360 U.S. 548, also ignored by petitioners, even the dissenting opinion recognized that "under § 3, First (p) of the Act, if a carrier does not voluntarily comply with the Board's award, including wage awards for money damages, a wage earner can enforce the Board's order *only* by bringing, in a United States District Court, a suit" for enforcement. (360 U.S. at pp. 558-559; emphasis added.) The *Price* and *Day* cases were based in large part on the construction of Section 3 First in the *Chicago River & Indiana* case. These three cases are controlling here and make it entirely unnecessary for this Court to devote further attention to Section 3 First of the Railway Labor Act at this time.

The petition attempts to establish a conflict with *General Committee B.L.E. v. Missouri-Kansas-Texas R. Co.*, 320 U.S. 323 (Pet. 17-18). However, that case did not involve a minor dispute or the right to strike, and the statement relied upon by petitioners only notes that other modes for settling minor disputes had been employed in lieu of the new Railway Labor Act procedures.[3] The case merely held that the district courts could not decide jurisdictional disputes between railroad unions because Congress had committed such disputes to the National Mediation Board.

Petitioners also rely on *Union v. Kansas City Terminal Co.*, 352 U.S. 927, for an alleged conflict. (Pet. 16). In that case, a strike had been enjoined although neither the Union

[3] The portion of the opinion quoted by petitioners deals equally with the administrative processes before the Adjustment Board and the enforcement action under Section 3 First (p). 320 U.S. at p. 331 (Pet. 18). If this language ever had the significance attributed to it by petitioners, the dictum has been rejected in the decision in the *Chicago River & Indiana* case.

nor the Carrier had initiated the compulsory arbitration processes of Section 3 First. Since an injunction in that situation operated to maintain a stalemate, this Court vacated the injunction and remanded the cause "without prejudice to the power of the Court of Appeals to reinstate its judgment if the dispute is submitted to the Adjustment Board by either party within a reasonable time" (353 U.S. 927). The Court thus avoided a stalemate by requiring the carrier to invoke its remedies under Section 3 First of the Railway Labor Act.

The instant case is entirely different. No purpose would be served by vacating the judgment below, since respondent cannot initiate an action for review of the Adjustment Board awards in question.[4] The only procedure left under the Railway Labor Act is an enforcement suit brought by petitioners. Respondent, unlike the carrier in the *Manion* case, has done everything in its power to invoke the procedures of the Railway Labor Act and should not therefore be barred from asking petitioners to do the same. The *Manion* decision was carefully analyzed and distinguished in *Louisville & N.R. Co.* v. *Brown*, 252 F. 2d 149 (C.A. 5, 1958), certiorari denied, 356 U.S. 949, in which a strike was held illegal even though the dispute was not pending before the Adjustment Board. The court noted that the carrier in the case before it could not have submitted the dispute to the Board at the time the strike was called. Therefore an injunction "would lie to prevent the frustration of the statutory grievance adjustment procedure." 252 F. 2d at p. 154. In the present case respondent's inability to initiate judicial review should not allow petitioners to frustrate the statutory grievance adjustment procedure. The decision below preserves the jurisdiction of the district court to

[4] *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235 (C.A.D.C., 1941), affirmed by an equally divided Court, 319 U.S. 732.

decide this dispute, just as the *Chicago River & Indiana* decision enabled the Adjustment Board to proceed.

2. Section 4 of the Norris-La Guardia Act does not bar an injunction here, for it is settled that equitable relief may be accorded to enforce the Railway Labor Act. Acknowledging this principle, even petitioners assume "*arguendo* that Section 4 does not prohibit the injunction here involved" (Pet. 25). Congressman La Guardia himself said that railroad employees could not strike until they had exhausted their remedies under the Railway Labor Act. 75 Cong. Rec. 5504. This principle has been recognized in many judicial decisions. *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U.S. 30, 39-42; *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R. Co.*, 363 U.S. 528, 531; *Order of Railroad Telegraphers* v. *Chicago and North Western R. Co.*, 362 U.S. 330, 338-339; *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U.S. 711, 725; *Norfolk & Portsmouth Belt Line R. Co.* v. *Brotherhood of Railway Trainmen*, 248 F. 2d 34, 45, 46 (C.A. 4, 1957), certiorari denied, 355 U.S. 914; *Louisville & Nashville R. Co.* v. *Brown*, 252 F. 2d 149, 154 (C.A. 5, 1958), certiorari denied, 356 U.S. 949; *Brotherhood of Railway and Steamship Clerks* v. *Railroad Retirement Board*, 239 F. 2d 37, 41, 42 (C.A.D.C., 1956); and *American Airlines, Inc.* v. *American Air Line Pilots Assn.*, 169 F. Supp. 777, 787 (S.D.N.Y., 1958). See also Comment, "Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes," 60 Columbia Law Review 384, 386-391, 396 (1960). Likewise, in *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, the Trainmen, among other things, threatened to strike in order to enforce anti-Negro discriminatory practices (343 U.S. at pp. 769-771). This Court upheld the district court's jurisdiction to issue necessary injunctive orders notwithstanding the Norris-La Guardia

Act (at pp. 774-775). The district court was ordered to award appropriate relief, which necessarily would include enjoining further strike threats.

Respondent is not barred from injunctive relief by Section 8 of the Norris-La Guardia Act, if applicable. (As already shown, it is doubtful that the Norris-La Guardia Act applies.) Petitioners contend that respondent has failed to exert every reasonable effort to settle this dispute under Section 8 (Pet. 14-15, 19-20, 25), which makes such a record a prerequisite to equitable relief. *Infra*, p. 18. The petition implies that respondent made no effort to settle this dispute by negotiation. In fact, respondent did negotiate the claims involved in this case on the property before they were ever submitted to the Adjustment Board (Pet. 5). Respondent also participated before the Board (R. 13, 15), met with petitioners several times after the awards were rendered (R. 41-43), participated in mediation (R. 8, 62), and invited petitioners to settle the dispute peacefully by bringing an enforcement suit (R. 42-43). In short, respondent did everything that could reasonably be expected. It did not continue to negotiate or offer compromises as to the merits of the controversy after the awards were rendered (R. 28), although respondent did terminate the practice complained of in Award 19389 (R. 43). But Section 8 of the Norris-La Guardia Act does not require a plaintiff either to make concessions or to negotiate *ad infinitum*. The duty to negotiate under this provision is comparable to the duty to bargain in good faith under the National Labor Relations Act (*Brotherhood of R. Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U.S. 50, 61, note 18), which does not require the making of concessions or "fruitless marathon discussions," *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 404. This is particularly true of minor disputes, as to

which the rights of the disputants are governed by an existing agreement and can be adjudicated.

Under the National Labor Relations Act employers have no duty to bargain over grievances if machinery for adjusting them has been established (*Timken Roller Bearing Co.* v. *National Labor Relations Board*, 161 F. 2d 949 (C. A. 6, 1947); *National Labor Relations Board* v. *Standard Oil Co.*, 196 F. 2d 892 (C. A. 6, 1952); *National Labor Relations Board* v. *Knight Morley Corp.*, 251 F. 2d 753, 759-60 (C. A. 6, 1957), certiorari denied, 357 U.S. 927), and a union which insists on negotiation is guilty of an unfair labor practice. *Chemical Workers Union*, 123 N.L.R.B. 1507 (1959). The same principle applies to the railroad industry in which the adjustment procedure for minor disputes is provided by statute. Thus the Mediation Board has stated:

> "Where agreements cover the questions in dispute, there is no need for mediation because the issues were intended to be settled by the agreements. To mediate or to compromise such questions may have the effect of modifying or setting aside what was agreed upon. Therefore, such disputes require adjudication just as business contracts often have to be adjudicated in the courts." National Mediation Board, "Administration of the Railway Labor Act, 1934-1957," p. 41.

Petitioners' reliance on *Brotherhood of Railroad Trainmen* v. *Toledo P. & W. R. Co.*, 321 U.S. 50, which involved a major dispute, is unwarranted. A carrier's duty under Section 8 is different in a major dispute because there "the Railway Labor Act does not provide a process for final decision * * *." *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 42, note 24. Moreover, in the *Toledo* case the union agreed but the carrier refused to arbitrate a dispute. The present case represents the oppo-

site situation. The carrier has invited the Trainmen to file an enforcement suit so that the dispute can be settled peacefully, but they have refused. Therefore the blame for the strike lies squarely on the union rather than on the carrier.

Conclusion

The decision below is correct and required by recent decisions of this Court. No unsettled question of importance is actually presented, and there is no conflict of decisions. Accordingly, a writ of certiorari should not issue.

Respectfully submitted.

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APPENDIX

Section 2 of the Railway Labor Act provides (45 U.S.C. § 151a):

"General Purposes

"(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

Section 2 First of the Railway Labor Act provides (45 U.S.C. § 152 First):

"General Duties

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 3 First (i) of the Railway Labor Act provides (45 U.S.C. § 153 First (i)):

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of

grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.".

Section 3 First (p) of the Railway Labor Act provides (45 U.S.C. § 153 First (p)):

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing

actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

Section 3 First (q) of the Railway Labor Act provides (45 U.S.C. § 153 First (q)):

"(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

Section 7 First of the Railway Labor Act provides (45 U.S.C. § 157 First):

"First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties, or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however*, That the the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise."

Section 8 of the Norris-La Guardia Act provides (29 U.S.C. § 108):

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."